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No. 86-1573

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONNER AIR LINES, INC.,
Petitioner,
v.

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

**SUPPLEMENT TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

I

Is the interpretation of a statute or regulation by the agency charged with administering that statute entitled to great deference by this Court?

II

Can a Federal agency escape liability for attorney fees under the Equal Access to Justice Act by merely showing that its action had a rational basis, or must it show that its action had a solid basis?

III

Does a recent decision by this Court to grant certiorari in a related case warrant the granting of Petitioner's Writ of Certiorari?



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ADDITIONAL BASIS FOR GRANTING THE WRIT

**A. The Recent Decision By The National Transportation
Safety Board Awarding Attorney Fees And Expenses
To Petitioner Under The Equal Access To Justice Act
Should Be Afforded Great Weight By This Court.**

This supplement is respectfully submitted to the Court pursuant to Supreme Court Rule 22.6 in order to present new cases and authorities which were not available at the time the Petition for Writ of Certiorari was filed on March 31, 1987.

The underlying case which gives rise to this petition involved separate proceedings before the National Transportation Safety Board ("NTSB") and the United States

Court of Appeals for the Eleventh Circuit. When the Federal Aviation Administration ("FAA") suspended Petitioner's operating authority on an emergency basis, Petitioner pursued its remedies by (1) a proceeding on the merits of the alleged regulatory violations before the NTSB and (2) a simultaneous proceeding before the Eleventh Circuit seeking relief from the immediate effect of the suspension. When the FAA designates a suspension action as an emergency, the normal procedures, which automatically stay the effect of the suspension pending a decision on the merits by the NTSB, do not apply. Moreover, the NTSB does not have jurisdiction to grant a stay in an emergency case. Thus, the certificate holder must seek such relief from the appropriate United States Court of Appeals.

As a result of pursuing the above remedies, Petitioner (1) obtained a stay from the Eleventh Circuit pending NTSB review and then (2) prevailed before the NTSB on the merits. The Equal Access To Justice Act ("EAJA") requires an applicant for an award of attorney fees to make a separate application to each court or administrative agency before which the legal services in question were performed. Accordingly, Petitioner submitted separate EAJA applications to the Eleventh Circuit and the NTSB.

The Eleventh Circuit denied Petitioner's EAJA application. That denial is the decision which Petitioner is asking this Court to review. Following the filing of the petition with this Court, the NTSB issued a decision granting Petitioner's EAJA application for services rendered before the NTSB. In so doing, the NTSB applied and interpreted the same regulations and statutes which were involved in the proceeding before the Eleventh Circuit. Such an interpretation of the statutes and regulations by the agency charged with administering the statute is clearly relevant to this Court. Consequently, it has become necessary to supplement the petition pending before this Court.

The NTSB decision was issued June 5, 1987, and it is entitled *Conner Air Lines, Inc. v. Donald D. Engen, Administrator, Federal Aviation Administration*, NTSB Order No. EA-2531 (June 5, 1987). By this decision, the NTSB found Petitioner eligible for an award of attorney fees and expenses pursuant to the EAJA. Since the NTSB's decision is not a reported one, the decision has been reprinted in the Supplemental Appendix at the end of this document. The decision by the NTSB concludes:

The Administrator has not established that he was substantially justified in ordering the suspension of the applicant's operating certificate and the airworthiness certificate of its aircraft.

See Supplemental Appendix at SA-2.

This decision by the NTSB has direct application to the issue before this Court. It has long been the rule that a court must give considerable deference to an agency's interpretation and construction of its own statutes. *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). Additionally, this rule of law is more vital, and deference even more important, when the agency is interpreting its own regulations. In fact, it has been held that the ultimate criterion is the administrative interpretation by an agency of its own regulation. *United States v. Larionoff*, 431 U.S. 864, 872 (1977). A court should defer to an agency's interpretation unless the legislative history or purpose of the statute clearly reveals a contrary intent on the part of Congress. *Chemical Manufacturers Association*, 470 U.S. at 126.

The law is clear. The agency's interpretation of the law as it relates to its regulations is quite persuasive and this Court should have the benefit of reviewing the NTSB's ruling. *E.I. du Pont de Nemours & Co. v. Colins*, 432 U.S. 46, 54-55 (1977).

Moreover, this Court should give great weight to the NTSB's determination. The NTSB is charged with administering the statute and the regulations in question. The heart of the NTSB opinion states:

The Administrator has *no reasonable basis in law or in fact* for the view that the regulations proscribed the unobtrusive taping of the inspection records.

See Supplemental Appendix at SA-3 (emphasis added). The NTSB found that there was no rational basis for the FAA to believe that the taping would intrude upon the inspection process. That belief was the sole basis for the FAA issuing the Emergency Order of Suspension. Thus, this Court should give great deference to the determination of the NTSB in its application of the law to these facts.

The underlying action before the NTSB involved the question of whether certain regulations were violated. The underlying action before the Eleventh Circuit involved the question of whether the FAA properly found that an emergency existed due to those alleged regulatory violations. While these two questions are different, they are inextricably intertwined. If there was no basis in law or fact for the FAA to allege that the regulations had been violated, there certainly was no reasonable basis on which to conclude that there was an emergency requiring the immediate suspension of Petitioner's operations.

B. In Order For the Federal Aviation Administration To Be Substantially Justified In Taking The Action It Did Against Petitioner, The Agency's Position Must Be Shown To Have Had More Than Just A Reasonable Basis In Law And Fact.

Since the filing of the petition with this Court, the United States Court of Appeals for the Sixth Circuit has issued its decision in *Riddle v. Secretary of Health and Human Services*, No. 86-5228 (6th Cir. May 1, 1987).

After conducting an in-depth analysis of the legislative history of the EAJA, the Sixth Circuit held that:

In order to be substantially justified, the government's position must have *more* than a "reasonable basis" in law and fact. *Instead, the government's position must be firmly grounded or solidly based in law and fact.*

Id. at 12 (emphasis supplied).

The court in *Riddle* reversed the District Court for the Western District of Kentucky, which had applied the rational basis standard, and refused to equate the rational basis standard with the substantially justified standard. *Id.* The Sixth Circuit also stated that the adjective "substantial" connotes a meaning which indicates that which is sturdy, solid or firm and not imaginary or illusive. *Id.* at 5.

In the case at bar, the FAA clearly had no "solid basis" on which to rely. As the NTSB stated in Order No. EA-2531:

In rejecting the Administrator's position that the applicant violated the regulations by unobtrusively recording the Administrator's inspection of the applicant's records at its place of business, the Board found that the applicant did everything that the regulations cited in the complaint required it to do, that the applicant did nothing that the regulations proscribed, that the Administrator's action was an impermissible attempt to rewrite the regulations and apply them retroactively, and that the Administrator's reliance on cases dealing with different regulations on access to the observer's seat in cockpit for enroute inspections was misplaced.

See Supplemental Appendix at SA-3. The *Riddle* court clearly pointed out that Congress undeniably rejected the rational basis standard in favor of the substantially justified test. *Id.* at 7-12. The FAA failed to meet this

stringent burden and the Eleventh Circuit erred in not granting Petitioner's EAJA application.

C. This Court's Recent Decision To Grant Certiorari In A Related Case Warrants The Grant Of Certiorari In The Case At Bar.

Since the filing of the petition herein, the Court has granted certiorari in *Pierce v. Underwood*, 802 F.2d 1107 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3768 (U.S. May 19, 1987) (No. 86-1512). The *Underwood* case also involves the EAJA. In its petition for writ of certiorari in *Underwood*, the Government argues that a court in ruling on an EAJA application should look for "objective indicia" that the Government's position was substantially justified. The Government asserts that there is an "objective indicia" in *Underwood* in that a stay was granted earlier by the Supreme Court. Hence, it is argued that the Ninth Circuit's decision to grant attorney fees is erroneous.

In the case at bar, the Eleventh Circuit granted a stay of the FAA's emergency order. This was the first time ever that a court determined that the FAA's exercise of its emergency authority was an abuse of discretion and thus arbitrary and capricious. *See* Petition for Writ of Certiorari at 7-8. Thus, the very criteria which the Government urges this Court to adopt in *Underwood* supports a finding that the Government's position was not substantially justified in the case at bar. If this Court decides not to grant the Petition for Writ of Certiorari, independently in this case, Petitioner respectfully requests that the case at bar be considered jointly with *Underwood*.

CONCLUSION

This Court should give great deference to the NTSB's decision ordering payment of attorney fees to Petitioner under the EAJA. That decision clearly shows the error of the Eleventh Circuit in denying Petitioner's EAJA application. In light of the recent decisions by this Court, the NTSB, and the Sixth Circuit, this Court should grant the Petition for Writ of Certiorari, remand the case to the Eleventh Circuit for further proceedings, or summarily reverse the Eleventh Circuit's order.

Dated: June 17, 1987

Respectfully Submitted,

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL
APPENDIX

SA-1

Served: June 5, 1987

NTSB Order No. EA-2531

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY
BOARD at its office in Washington, D.C.
on the 15th day of May, 1987

Docket 37-EAJA-SE-7342

CONNER AIR LINES, INC.,
Applicant,

v.

DONALD D. ENGEN, Administrator,
Federal Aviation Administration,
Respondent.

OPINION AND ORDER

The applicant has appealed from the initial decision¹ of Administrative Law Judge Joyce Capps, served December 19, 1986, denying its application for attorney fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 and the Board's rules implementing that Act (49 C.F.R. Part 826). The law judge determined that the applicant was a prevailing party and met all of the eligibility requirements for an award, but she denied the application concluding that the Federal Aviation Administration (FAA) was "substantially justified" in issuing the emergency order which sus-

¹ A copy of the initial decision is attached.

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pended the applicant's Air Carrier Operating Certificate and the airworthiness certificates of six aircraft.²

In its brief, the applicant contends that the FAA failed to meet its burden of proof to show that its actions were substantially justified because there was no reasonable basis in truth for the disputed facts alleged in the complaint, there was no reasonable basis in law for the FAA's theory that the applicant's insistence on taping the record examination amounted to a refusal to allow the FAA to conduct an inspection of the airline and its aircraft, and the facts alleged in the complaint do not reasonably support the legal theories advanced by the FAA. The applicant also contends that the law judge's opinion does not support a finding that the FAA's actions were substantially justified. The Administrator has filed a reply brief opposing the appeal and requesting affirmance of the initial decision.

Upon consideration of the entire record, the Board concludes that the Administrator has not established that he was substantially justified in ordering the suspension of the applicant's operating certificate and the airworthiness certificate of its aircraft. Therefore we reverse the initial decision.

The pertinent facts are recited in the Board's underlying decision and only will be briefly outlined herein. The Administrator requested that the applicant make available for inspection specified maintenance records for six aircraft. The applicant made all of the requested records available on March 24, 1986, the date specified by the Administrator. The head of the FAA inspection team consented to the applicant's use of an audio recorder

² Under the EAJA, as amended, an eligible party shall be awarded attorney fees and other expenses when it prevails over the agency unless "the position of the agency was substantially justified" or "special circumstances make an award unjust". 5 U.S.C. § 504 (a) (1).

during the examination of records at the applicant's place of business, and the applicant also openly used a video recorder during the inspection. After a lunch break, the team leader objected to the use of the video recorder, and the FAA took the position that it would refuse to continue the inspection unless the applicant removed the audio and video recorders. The emergency order of suspension was premised on the FAA's view that the applicant's insistence on recording the inspection while at the same time providing complete access to its records constituted a refusal to make the records available and to allow the inspection.³

In rejecting the Administrator's position that the applicant violated the regulations by unobtrusively recording the Administrator's inspection of the applicant's records at its place of business, the Board found that the applicant did everything that the regulations cited in the complaint required it to do, that the applicant did nothing that the regulations proscribed, that the Administrator's action was an impermissible attempt to rewrite the regulations and apply them retroactively, and that the Administrator's reliance on cases dealing with different regulations on access to the observer's seat in the cockpit for enroute inspections was misplaced.

The Administrator had no reasonable basis in law or fact for the view that the regulations proscribed the unobtrusive taping of the inspection of records. Moreover, the cases applying the enroute inspection rules undercut rather than supported the Administrator's action in this

³ The applicant successfully had completed two years under the National Air Transportation Inspection program, and less than one month before the record examination in question in this case, the FAA had notified the applicant that its records and operations were in good shape. Moreover, there is no evidence that the inspection team discovered any problems, discrepancies, or violation of any regulations during the inspection on the morning of March 24, 1986.

case because those rules, unlike the rules at issue in this case, clearly addressed the manner in which compliance was to be achieved. Despite vigorously arguing that the taping of the record examination thwarted and prevented the inspection, the Administrator has not addressed the following reasoning the Board relied on to reverse the Administrator's complaint:

"The Administrator has not explained what additional intrusion the audio and video recording conducted herein would impose beyond the not unauthorized presence of the operator's representative while an inspection is in progress." (Opinion and Order, p.12, fn. omitted).

The Administrator has not explained and presumably has no explanation to justify treating the open taping of a record inspection any differently from the permissible observation of the inspection by agents of the carrier.⁴

ACCORDINGLY, IT IS ORDERED THAT:

1. The applicant's appeal is granted;
2. The initial decision is reversed; and
3. The matter is remanded to the law judge for the purpose of deciding the attorney fees and expenses to be awarded.

BURNETT, Chairman, GOLDMAN, Vice Chairman, LAUBER and NAIL, Members of the Board, concurred in the above opinion and order.

⁴ The law judge did not have to reach the question of whether special circumstances make an award unjust, and we do not find such circumstances present in this case.

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Served: December 19, 1986

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

Docket 37-EAJA-SE-7342

CONNER AIR LINES, INC.

Applicant

vs.

DONALD D. ENGEN, Administrator
Federal Aviation Administration

Respondent

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Richard Lewis Faber, Esq., for the Administrator.

INITIAL DECISION AND ORDER DENYING
APPLICATION FOR ATTORNEY FEES AND
OTHER EXPENSES

JOYCE CAPPS, Administrative Law Judge:

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504 *et seq.*, and the Board's implementing rules thereunder, 49 CFR 826.1 *et seq.*, the above-named applicant has applied for an award of attorney fees and other expenses against the Federal Aviation Administration (FAA), an agency of the United States.

By Emergency Order of Suspension dated March 26, 1986, the FAA suspended the applicant's Air Carrier Operating Certificate and the airworthiness certificates of six aircraft due to its alleged violation of Section 121.81 in that it refused to the Administrator his right

to make inspections of the applicant's operation and of Section 121.380(c) by refusing to make available to the Administrator the maintenance records of the six aircraft for inspection. Said certificates were ordered suspended until such time as the applicant permitted the Administrator to conduct the pertinent inspections in a free and uninterrupted manner, including the absence of video and/or audio taping of inspectors while conducting the inspections.

The underlying issue at hearing was what constitutes an inspection within the meaning of the regulations? It was determined by this judge in a bench decision that the applicant was in violations of the cited regulations, the rationale being (1) that inspectors are entitled to conduct inspections with a reasonable degree of privacy among themselves, and (2) that the Administrator's right to inspect at reasonable times and places is an unconditional right. The time and place for the inspection was agreed to by the parties. In the final analysis, it was the opinion of this judge that the applicant's insistence that the inspections must be videotaped (a condition that was unacceptable to the Administrator) was tantamount to a refusal by the applicant to permit the inspections involved.

The Oral Initial Decision and Order was reversed by the Board in NTSB Order No. EA-2335 (June 2, 1986), *reconsideration denied*, NTSB Order No. EA-2379 (Aug. 6, 1986). Thus, the applicant is a prevailing party. It is noted also that the Application and supporting documents filed by the applicant establish that it meets all eligibility requirements set forth in the Act and the Board's Rules, and that the Application is both timely filed and procedurally correct.

However, an otherwise eligible party may not receive an award of attorney fees and other expenses if it is shown that the FAA's action was "substantially justified" within the meaning of Section 504(a)(1) of the EAJA.

This was a case of first impression as to whether the applicant's insistence on video taping the inspection (i.e., establishing a condition precedent to an inspection) was tantamount to a refusal to allow inspection. The FAA had a right and duty to bring this action for an adjudication of that issue. I obviously think the FAA's action had a reasonable basis both in law and fact and was not "weak" or "tenuous" since I agreed with it. The fact that the Board disagreed with my interpretation of what constitutes an inspection makes the FAA's action no less responsible, reasonable, and justified.

The essential facts in this case are not in dispute. The commencement of this action was neither arbitrary nor capricious. Rather, it was a necessary and proper step in having the legal issue adjudicated. That has been done and the Board has spoken and laid that issue to rest. We now have precedent to guide the Administrator, attorneys, and judges in future similar situations. Furthermore, the decision of the U. S. Court of Appeals for the Eleventh Circuit as to the "emergency nature" of the case is extraneous to the precise issue of whether the FAA's action against the applicant was "substantially justified."

It should be noted that this decision renders moot the motion and response thereto involving claimed time for a luncheon which occurred on April 3, 1986.

It having been found that the FAA's position was substantially justified, it is concluded that the applicant is not entitled to an award of attorney fees and other expenses under the EAJA. Therefore, it is

ORDERED, That the application for attorney fees and other expenses is hereby denied.

Entered this 19th day of December, 1986.

/s/ Joyce Capps
JOYCE CAPPS
Administrative Law Judge